

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1183

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DOCKET NO. 77-1183

UNITED STATES OF AMERICA

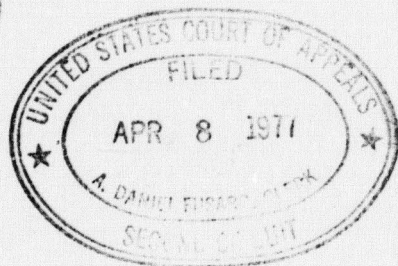
PLAINTIFF-APPELLEE

VS.

MARGARET ROBINSON and PATRICIA SAVERESE

DEFENDANTS-APPELLANTS

BRIEF OF APPELLANT PATRICIA SAVERESE



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District of Connecticut
HON. JON O. NEWMAN, District Judge

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MARGARET ROBINSON and PATRICIA SAVERESE,

APPELLANTS.

BRIEF OF APPELLANT PATRICIA SAVERESE

STATEMENT OF THE CASE

The appellant Patricia Saverese was indicted with appellant Margaret Robinson and a third individual on April 21, 1976, in the District of Connecticut. She was charged with conspiring with the others to embezzle funds of the First New Haven National Bank. She pled not guilty, as did Appellant Robinson. The third individual's case was severed.

Jury selection for the joint trial of the two plaintiffs took place on June 21, 1976, before Hon.

O. Newman. Following challenges for cause against the members of the array, 37 names were drawn by the Clerk of the Court. Against these persons, the Government was permitted to exercise 7 peremptory challenges and the defendants were permitted jointly to exercise 13 peremptory challenges. It was intended that the remaining 17 would constitute a jury and five alternates, since the actual trial was not scheduled to begin until later in the summer.

At that point, however, before the jury was sworn, the defendants moved to strike four of the Government's peremptory challenges on the ground that they had been used to exclude black persons from the jury. Proceedings were thereupon suspended, to permit presentation of evidence by way of affidavits. On October 15, 1976, the Court filed an order granting the defendants' motion and restoring to the pool of potential jurors the four blacks stricken by the Government. United States v. Robinson, 421 F. Supp. 467 (D. Conn. 1976).

On November 29, 1976, jury selection resumed with the 17 people previously selected and the four blacks who had been restored to the group constituting the pool from which a jury was to be drawn. Of these people, one white person and one black person were absent for reasons acceptable to all parties, leaving a pool of 19. A jury of twelve persons and two alternates was drawn. Two of the twelve regular jurors were black; the remaining ten and the two alternates were white.

During the proceedings on November 29, the Government advised Judge Newman that it was about to seek a writ of mandamus to vacate his order restoring the four blacks to the jury pool and objected to further jury selection on that date. After checking with the Clerk of the Court of Appeals, Judge Newman ascertained that no papers had been filed by the Government [Joint Appendix, p. 89] and declined to stay jury selection.

There was brief discussion of whether the jury should be sworn. Attorney Bowman, speaking on behalf of both defendants, expressed the view that the newly-selected jury need not be sworn pending resolution of the Government's petition for mandamus. [Jt. App. p. 80.] Nevertheless, the jury selected November 29 was sworn that day. [Jt. App. p. 98.]

On January 25, 1977, this Court decided United States v. Newman, Docket No. 76-3077, and granted the Government's petition and remanded the case to the district court with directions to remove the black people from the jury. The Court directed:

On remand the district court will afford the defendants the opportunity...to proceed with the present jury after the three members, previously ordered onto the final panel by the district court, have been removed, and that the places of the discharged members of the jury panel be filled by the two remaining alternates, and that the two unassigned veniremen from the jury pool take the places of the two alternates who have become members of the jury panel.

In the event that the two defendants fail to agree on the above procedure, the cases will have to be severed. If the defendants do not elect to proceed as first suggested above, the district judge will declare a mistrial and order that the case be reassigned for trial with reasonable promptness.

[Slip Opinion at 1582; Jt. App. p. 35.]

A petition for rehearing and suggestion for rehearing en banc were denied on March 31, 1977.

The two defendants returned to the district court on March 7, 1977, for further proceedings pursuant to this Court's mandate. They objected to a mistrial and pointed out that a mistrial was unnecessary to accomplish the result intended by the Court of Appeals:

MR. WILLIAMS: If it please the Court, the jury as presently sworn consists of twelve members and two alternates. The Court of Appeals has directed only that the two black people be stricken, which would leave a jury of twelve with no alternates. There is clearly no manifest necessity for bringing in outside people and adding them to that jury, which would, in effect, mean a new jury. We object to it. We object to a mistrial. We object to proceeding with anything other than the jury that we have because even under the opinion of the Court of Appeals, it is still possible to try this case with a jury of twelve as already selected and sworn. ... [I]t's our position that that is the only possible alternative which would not violate our clients' right to be protected against double jeopardy.

[Jt. App. p. 104.]

Judge Newman stated that he would permit the defendants to proceed without alternates only if they agreed to be tried by less than twelve should a juror become ill. [Jt. App. p. 105.] The defendants objected to this proposal, pointing out that the trial was expected to be a short one lasting less than a week. [See Jt. App. p. 99.]

MR. WILLIAMS: ... I would like to add one additional comment, and that is that so far as I am aware, we have no report that any of the remaining twelve members of the current jury has become ill or in any way indisposed. We have no manifest necessity for proceeding with anything other than those remaining twelve....

THE COURT: I disagree with you on that. It seems to me there is always a need for alternates, simply because none of us can predict who is going to be ill tomorrow....

MR. WILLIAMS: That's true in any trial. If we select two alternates, we can't guarantee three people won't get sick. That doesn't preclude us from proceeding with our trials in the usual manner. Here we all agree this is going to be a relatively short trial, so I still believe there is no manifest necessity.

[Jt. App. pp. 110-11.]

Nevertheless, because the defendants refused to permit the swearing of a new jury containing additional persons and because they would not bind themselves to accept a verdict by less than twelve jurors, the district court declared a mistrial over their objections.

The defendants thereupon moved to dismiss on double jeopardy grounds. [Jt. App. pp. 36, 37.] The district court denied the motion on March 25, 1977, [Jt. App. pp. 38-47] and this appeal followed.

QUESTIONS PRESENTED

1. Does This Court Have Jurisdiction Of This Appeal?
2. Was There No Manifest Necessity For a Mistrial In This Case?
3. Did The Defendants Not "Consent" To The Granting Of A Mistrial In This Case?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

A R G U M E N T

I

THIS COURT HAS JURISDICTION OF THIS APPEAL.

Jeopardy attached in this case when the jury was sworn on November 29, 1976. Downum v. United States, 372 U.S. 734 (1963). A new jury has not yet been selected or sworn, and the district court has stayed further proceedings pending a ruling by this Court on the present appeal.

This appeal is properly before the Court at this time under the authority of United States v. Beckerman, 516 F.2d 905, 906-07 (2d Cir. 1975), and United States v. Alessi, 544 F.2d 1139, 1152 (2d Cir.), cert. denied, 97 S. Ct. 384 (1976). See United States v. DiSilvio, 520 F.2d 247 (3d Cir.), cert. denied, 423 U.S. 1015 (1975); United States v. Barket, 530 F.2d 181 (8th Cir. 1975). If the defendants are to be afforded "the full protection of the double jeopardy clause, a final determination of whether jeopardy has attached...must...be determined prior to...retrial." United States v. Beckerman, supra, at 906,

quoting United States v. Lansdown, 460 F.2d 164, 171 (4th Cir. 1972).

II

THERE WAS NO MANIFEST NECESSITY FOR A MISTRIAL
IN THIS CASE.

This is not a case in which a mistrial was declared at the defendants' request, see generally United States v. Goldstein, 479 F.2d 1061, 1067 (2d Cir. 1973), and certainly is not one in which a mistrial was required because of the misconduct of defense counsel, United States v. Dinitz, 424 U.S. 600 (1976). Accordingly, the present appeal must be decided by applying the rule most recently expressed by this Court last month in United States v. Grasso, No. 76-1284 (March 9, 1977):

When a mistrial is declared sua sponte by a court without defendant's consent, express or implied, the double jeopardy clause permits retrial of the defendant only if, in the words of Mr. Justice Story, 'there [was] a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated.' United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

Slip Opinion at 2254.

In its opinion denying the defendants' motions to dismiss on double jeopardy grounds, the district court expressed the view that perhaps its options were somewhat limited by the language of the Second Circuit's mandate in United States v. Newman and thus, by implication, that the mistrial declaration might not have been entirely sua sponte. [Jt. App. pp. 42-43.] On April 5, 1977, at oral argument in this Court on the defendants' motion for a stay, the Government expressed a similar view: that the language in Newman, quoted supra at p. 4, left both the district court and this court on the present appeal with no alternatives to mistrial -- requiring either the creation of a new jury by adding unsworn persons to the previously sworn jury or the selection of an entirely new group of twelve. We disagree.

The opinion in United States v. Newman concerned itself only with the propriety of the district court's action in striking the Government's peremptory challenges of black people. The only practical effect upon the jury sworn in this case of the mandate there issued is that two of the fourteen persons sworn were disqualified from service on the jury. The Court did not require Judge

Newman to declare a mistrial (nor, obviously, bind this panel to approve such action), and that fact was implicitly recognized by Judge Newman on March 7 when he advised counsel: "I would further think that the defendants can elect to proceed without alternates, provided they also agreed to accept less than a jury of twelve in the event a regular juror became ill....I think it would be possible, if you object to two new alternates, to dispense with them, provided we had an assurance that we wouldn't need alternates." [Jt. App. pp. 105-06.]

Thus, as the district court itself recognized in the discussion quoted above, it did have the power to avoid a mistrial and proceed to trial with only those jurors already sworn. In the final analysis, its decision to declare a mistrial was based on the defendants' refusal to stipulate in advance to accept a verdict by a jury of less than twelve people. Accordingly, the issue presented for decision here is whether a manifest necessity for mistrial existed when a short and uncomplicated trial was about to begin with twelve healthy jurors but no alternates.

No court has ever before held that such facts made the declaration of a mistrial a manifest necessity. Were the reasoning of the district court to become law in this

Circuit, one may wonder what would be the obligation of trial judges if in the middle of long and complicated trials illness were to reduce the total number of jurors and alternates to twelve. Shall such trials henceforth be aborted at that point? If not, how can it be said that there was a manifest necessity for doing so in this case?

As this Court said in Grasso, supra, slip opinion at 2256 n., the "manifest necessity" prerequisite to nonconsensual mistrials prohibits the ordering of mistrials over defense objection unless "clearly no reasonable alternative existed." Citing Illinois v. Somerville, 410 U.S. 458 (1973), and United States v. Jorn, 400 U.S. 470 (1971). The alternative available in this case was trial of a simple criminal indictment before a jury of twelve healthy and impartial citizens. Surely that alternative was "reasonable"; indeed, it was the district court's demand for more than this that was unreasonable.

In determining whether manifest necessity requires the declaration of a mistrial over defense objection, each case must of course be decided on its own facts. E.g., United States v. Gentile, 525 F.2d 252, 255 (2d Cir. 1975). Some examination of prior cases may be useful, however, in

arriving at an understanding of the meaning of the words
"manifest necessity."

A manifest necessity for mistrial has been found in cases where juries have reported themselves hopelessly deadlocked. United States v. Goldstein, supra; United States v. Beckerman, supra; United States v. See, 505 F.2d 845 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975). Manifest necessity also has been found to exist when defense counsel was injured in an automobile accident so seriously that he was unable to continue with the trial, United States v. Wayman, 510 F.2d 1020 (5th Cir. 1975); where a juror expressed an opinion on the defendant's sanity, Smith v. Mississippi, 478 F.2d 88 (5th Cir. 1973); where a juror was seen talking with the defendant's wife and daughter-in-law, United States v. Pridgeon, 462 F.2d 1094 (5th Cir. 1972) (per curiam); and where an incurable defect in the indictment, not capable of waiver by the defendant's failure to object, could be asserted on appeal or in a postconviction proceeding to overturn a conviction, Illinois v. Somerville, supra.

Manifest necessity has been held not present when the trial judge determined that prosecution witnesses had not been properly warned of their rights to counsel and silence before being called to testify, United States v. Jorn, supra;

when a key prosecution witness was unavailable, Downum v. United States, supra; or as to one defendant when the Government proposed to offer his confession in evidence at a joint trial with other persons, United States v. Glover, 506 F.2d 291 (2d Cir. 1974). Manifest necessity has been held not present when the defendant failed to appear on time for the final day of his trial, United States v. Tinney, 473 F.2d 1085 (3d Cir.), cert. denied, 93 S. Ct. 2752 (1973); when jurors observed defendants in handcuffs during a trial recess, United States v. Walden, 448 F.2d 925 (4th Cir. 1971); when the prosecutor became ill during a simple trial, Jourdan v. State, 341 A.2d 388 (Md. App. 1975); when mention was made in the jury's presence of the defendant's offer to take a polygraph test, People v. Johnson, 240 N.W.2d 729 (Mich. 1976); and when the prosecutor presented irrelevant evidence of the defendant's parole status, People v. Gardner, 195 N.W.2d 62 (Mich. App. 1972).

In United States v. Spinella, 506 F.2d 426 (5th Cir. 1975), the Fifth Circuit found no manifest necessity for a mistrial when the defendant rested his case at a second trial without presenting evidence from the co-defendant

at his first trial when the professed need for such evidence had been the basis of granting the second trial. Other cases have found no manifest necessity for mistrial when a trial judge learned that his cousin was a friend of the defendant's father, In re Ferlito, 340 N.Y.S.2d 635 (N.Y. App. 1972); when the prosecutor mispronounced the victim's first name, State v. Allen, 191 S.E.2d 403 (N.C. App. 1972); or when a witness made disparaging remarks about defense counsel, Brooks v. Worrell, 190 S.E.2d 474 (W. Va. 1972). Other courts have found no manifest necessity for mistrial when assertions of jury deadlock were deemed on appeal to have been less than compelling. United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034 (3d Cir. 1975); United States v. Lansdown, supra.

Whether viewed in the context of these and other decisions applying the term "manifest necessity" to a variety of fact situations, in terms of sound public policy, or against the backdrop of "the realistic world of the trial court," United States v. Grasso, supra, slip opinion at 2266 (Timbers, J., dissenting), it would be wholly irrational and a dangerous precedent to find a manifest necessity for mistrial on the facts of this case.

III

THE DEFENDANTS DID NOT "CONSENT" TO THE GRANTING
OF A MISTRIAL IN THIS CASE.

At page six of its opinion denying the defendants' motions to dismiss on double jeopardy grounds, the district court says:

Unquestionably neither defendant moved for a mistrial. And it is equally clear that both expressed their opposition to the grant of a mistrial. But it does not follow that they have not nonetheless impliedly consented to a mistrial under the circumstances of this case. They were clearly advised that, under the mandate and opinion of the Court of Appeals, their failure to elect the first choice offered by the Court of Appeals would result in a mistrial. ... When the defendants rejected the first choice, knowing that the only alternative was a mistrial, they gave their consent to a mistrial in an entirely realistic sense.

[Jt. App. at pp. 43, 44.]

Such reasoning is difficult to characterize, but the argument can perhaps best be disposed of by pointing out that neither the facts nor the law limited the possible alternatives to the two thus presented by the district court. As has been discussed in the previous section of this brief, the most reasonable -- and only constitutional -- alternative was a third one: trial by the remaining twelve jurors

without alternates. This alternative was clearly and forcefully presented to the district court by the defendants, but rejected by it without good reason. There can be no suggestion of "consent" in the face of such facts.

When, on the basis of developments during trial, defense counsel in the Grasso case moved to dismiss, the trial court in response ordered a mistrial, and defense counsel did not object but merely said he did not agree with the remedy, this Court held that the defendant had not consented to the mistrial. United States v. Grasso, supra, slip opinion at 2250-51.

Even if the law in this Circuit on consent to mistrial declarations was that urged by Judge Timbers in his Grasso dissent, rather than that enunciated by the majority, the defendants in the present case certainly did not consent to what was done to them on March 7. In his dissenting opinion, Judge Timbers said:

Counsel should bear the responsibility, at the very least, to state his client's objection to the mistrial declaration...and not sit back and wait for a subsequent double jeopardy hearing....I see nothing in the double jeopardy bar which...relieves [the defendant] of the normal obligation to make a timely objection to an adverse ruling by the trial court....Since the very reason for requiring a hearing to determine the grounds for a mistrial declaration is to protect a right of the defendant, it does not strike me as unreasonable in the context of our

adversary system to require him to assert that right.

United States v. Grasso, supra, slip opinion at pp. 2263, 2265, 2266-67.

Here, the defendants not only strenuously objected to the mistrial declaration and expressly asserted their right to be tried by the original jury, they proposed to the trial court an entirely reasonable, practical and constitutionally acceptable alternative to mistrial which nevertheless complied with the mandate in United States v. Newman. Thus, these defendants went far beyond even the requirements which Judge Timbers would impose as a precondition to double jeopardy dismissal.

It is difficult to imagine what more could be required of a defendant to avoid a claim of "consent" to a mistrial than was present in this case.

C O N C L U S I O N

For the reasons recited above, this case should be remanded to the district court with directions to dismiss the Indictment.

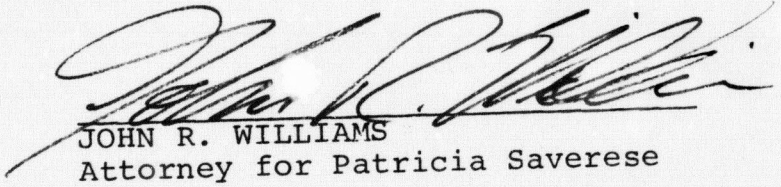
Respectfully submitted:



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CERTIFICATION OF SERVICE

This is to certify that on April 8, 1977, I personally delivered copies hereof to Attorney Andrew Bowman, attorney for appellant Robinson, and to the office of Assistant United States Attorney Michael Hartmere, and that I deposited in the United States Mail, first class postage prepaid, two copies hereof addressed to Hon. Thomas J. Meskill, United States Circuit Judge, United States Post Office, West Main Street, New Britain, Connecticut 06050.



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Attorney for Patricia Saverese

